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No. 03-777

IN THE

Supreme Court of the United States

WILLIE R. FLINT,
On behalf of himself and all others similarly situated,

Petitioner,

v.

ABB, INC., f/k/a ABB POWER T&D CO., INC., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I.

Does § 502(a)(1)(B) or § 502(a)(3)(B) of the Employee Retirement Income Security Act of 1974 ("ERISA"), authorize an ERISA plan participant to recover interest on long-term disability benefits paid after a successful administrative appeal where ERISA and the employee benefit plan do not provide for interest on reinstated benefits?

II.

Did the courts below err in dismissing the complaint with prejudice on several separate and independent grounds after allowing Petitioner an opportunity to amend his complaint once and without a further motion to amend by Petitioner?

STATEMENT PURSUANT TO RULE 29.6

The sole parent corporation of Respondent, ABB, Inc., is ABB, Ltd. of Zurich, Switzerland. No publicly held company owns 10% or more of ABB, Inc.'s stock. The remaining Respondents are all employee welfare or pension benefit plans organized pursuant to the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001, *et seq.* As such, the Plans are legal entities pursuant to ERISA. The Plans' sponsors, as defined by ERISA, are ABB, Inc. or subsidiaries of ABB, Inc. However, the Plans are not "owned" by any parent corporation, nor does any corporation own stock in any of the Plans.

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BRIEF IN OPPOSITION

For the following reasons, Respondents ABB, Inc., *et al.* ("ABB") respectfully suggest that the Petition for a Writ of Certiorari filed by Petitioner Willie R. Flint ("Flint") should be denied.

MISSTATEMENTS OF FACT OR LAW IN THE PETITION

Pursuant to Rule 15.2, ABB provides the following summary of misstatements of fact and law presented in the Petition for Certiorari.

1. ABB submits that the allegations in footnote 5 of the Petition, in which Flint contends "[t]he district court and court of appeals' opinions incorrectly state that Flint submitted additional *medical* information with his October appeal," (emphasis original), is a misstatement of the relevant facts. In paragraph 25 of the initial Complaint, Flint alleged that, following acceptance of his second appeal regarding the termination of his benefits, "Flint . . . furnished the *additional medical information* for his appeal" (emphasis added).

2. ABB submits that the allegations in Part IV. B of the Petitioner's "Statement" misstates the specific holding of the Court of Appeals with regard to Petitioner's claim pursuant to § 502(a)(3)(B). The Court expressly declined to decide whether § 502(a)(3)(B) could ever provide a basis for recovery of interest. It expressly affirmed based upon the District Court's conclusions that, assuming it could, Flint had failed to plead facts establishing a claim to relief. Pet. App. 10-12.

COUNTER-STATEMENT OF THE CASE

This case involves a claim for interest on a payment of disability benefits after a successful appeal under an employee long-term disability (LTD) benefit plan ("the Plan") established and maintained by ABB for its eligible employees. The Plan is therefore subject to the Employee Retirement

Income Security Act of 1974, 29 U.S.C. § 1001, *et seq.* ("ERISA"), as admitted in Flint's initial Complaint and Amended Complaint.[1] The dispute in this matter arose after Flint successfully appealed the termination of his benefits under the Plan, after which his benefits were reinstated and he received a retroactive, lump-sum payment of disability benefits. Pet. App. 3. Flint sought interest on the payment of benefits, which was denied by ABB. It is undisputed that the Plan did not provide for payment of interest in such circumstances. Pet. 7. It also is undisputed that the processing and determination of Flint's appeal was not in violation of the terms of the Plan, ERISA, or any Department of Labor regulations with regard to the timely processing of administrative appeals.[2] Pet. App. 3.

1. Background of Flint's Claim for Benefits.[3]

In March 1998, while Flint was an employee of ABB, he became disabled because of an automobile accident. Flint

1. Petitioner's request to certify the matter as a class action was denied as moot by the District Court based upon its determination on Respondents' Rule 12(b)(6) motion to dismiss. The class certification issue is not before this Court.

2. Flint does not make any allegation that the appeal process was untimely under ERISA or the terms of the Plan. *See* 29 C.F.R. ¶ 2560. 503-1(h)(1)(i)(60 days after request for review). In his Petition at 15, Flint admits the process was timely. This fact is also confirmed by affirmative allegations in the initial Complaint.

3. This matter is before the Court on review of the orders granting ABB's motions to dismiss the Complaint and the Amended Complaint as a matter of law pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. Accordingly, the substantive facts presented herein are based upon the allegations of the Complaint and are taken as true only for the purpose of these motions.

applied for and was granted LTD benefits under the Plan. Three years later, on June 19, 2001, the third party administrator of the Plan, Kemper National Services ("Kemper"), notified Flint that he was no longer totally disabled within the definition of the Plan and that his benefits were being terminated effective July 1, 2001. Pet. App. 2-3.

On July 2, 2001, Flint, through his counsel, appealed the termination of his LTD benefits under the Plan, and provided additional information supporting Flint's continuing disability. ABB, through Kemper, denied Flint's appeal on August 31, 2001. In response to Flint's request, ABB and Kemper provided Flint with Plan documents pertaining to LTD benefits by letter dated October 17, 2001.

In October 2001, Flint, through his counsel, filed a second appeal of the termination of his LTD benefits, and provided additional information of his disability. Flint requested an extension of time to furnish an updated medical report to support reinstatement because he was unable to see his doctor before the end of the appeal period, which was granted. Twelve days after Flint's second appeal, in November 2001, Kemper granted Flint an extension of time to provide further medical information to support his claim. On a date not specified in either complaint, Flint provided additional medical information to support his appeal, and allegedly demanded reinstatement of his LTD benefits, plus payment of all back payments due with interest. Pet. 7; Pet. App. 3.

On December 20, 2001, thirty-eight days after Kemper acknowledged the second appeal and fifty-two days after Flint's second appeal, Kemper reinstated Flint's LTD benefits under the plan retroactive to July 1, 2001. Kemper issued a

check to Flint for the full amount of the benefits on December 28, 2001, going back to the date benefits were discontinued. Thereafter, Flint inquired why interest had not been included with his payment of benefits. Kemper informed Flint that the Plan does not require payment of interest, and therefore, interest is not included with the payment of reinstated benefits. Pet. 6-7; Pet. App. 3.

2. Flint's Initial Complaint Was Dismissed by the District Court.

In February 2002, Flint filed suit seeking interest on the payment of Plan benefits following his successful administrative appeal, which he characterized as "delayed benefits." Flint contended the failure to provide interest denied him of his "full and complete benefits," even though, as the initial Complaint expressly recognized, the Plan documents contained no provision for payment of interest. Flint asserted, however, that he was entitled to recover the claimed accrued interest pursuant to § 502(a)(1)(B) and § 502(a)(3)(B) of ERISA's civil enforcement provisions. Pet. 7; Pet. App. 4.

ABB, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, moved to dismiss the Complaint for failure to state a claim upon which relief could be granted. The District Court granted the motion, by order filed April 10, 2002, as to the claim under § 502(a)(1)(B), ruling that, as a matter of law, there was no express or implied right to recover accrued interest for reinstated payments. The District Court reasoned this provision (§ 502(a)(1)(B)) was limited to claims for recovery of benefits as specifically provided in the relevant plan and, as the Complaint expressly averred the Plan did not provide for such interest, the Complaint failed to state a claim as a matter of law pursuant to § 502(a)(1)(B).

The District Court also granted ABB's motion with regard to Flint's claim under § 502(a)(3). The Court speculated that the "catch-all" provision therein concerning "appropriate equitable relief" *might* allow plaintiffs to recover accrued interest for reinstated benefits under circumstances where the benefits were unreasonably delayed or wrongfully withheld in violation of ERISA or the Plan. However, the District Court held the Complaint failed to plead any facts that would support such a claim and dismissed Flint's claim without prejudice and allowed Flint to submit an Amended Complaint.

Flint thereafter filed an Amended Complaint, which again asserted a claim for interest under the same ERISA civil enforcement provisions. Count I was premised upon § 502(a)(3) and claimed entitlement to interest on the retroactively-paid benefits on the basis of three alleged violations of ERISA or the Plan: (1) the failure to provide advance warning and an opportunity to submit additional medical information in support of continuing disability prior to terminating Flint's benefits; (2) inadequate notice of the specific reasons for termination of his benefits; and (3) providing Flint with incorrect Plan documents. The District Court concluded the first allegation was inadequate to support Flint's claim because there was no such requirement in the plan documents submitted, and relied upon, by Flint as attachments to the Amended Complaint. Pet. App. 20-21. The District Court found the second allegation was directly contravened by the written notice of the determination, which Flint also provided as an attachment to the Amended Complaint. *Id.*, 23. The District Court rejected the third allegation, finding there was no issue regarding the applicable plan documents, which Flint had attached and relied upon in the Amended Complaint. *Id.*, 24. In any event, the District Court questioned whether there was any logical relevance

between an alleged failure to provide plan documents after the denial of benefits where the alleged misconduct at issue was simply that the "initial denial itself should never have been made." *Id.*

Finally, the District Court held, as a matter of law, that whether or not the Plan's appeals process was timely completed was specifically relevant to whether a claim for interest could lie pursuant to the provisions for equitable relief in § 502(a)(3)(B).[4] Accordingly, as the Amended Complaint failed to plead facts demonstrating that benefits had been unreasonably delayed or wrongfully withheld, the District Court dismissed the Amended Complaint, with prejudice, for again failing to allege facts that, if proven, could entitle Flint to relief under § 502(a)(3)(B) or § 502(a)(1)(B).[5] Pet. App. 24-26.

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4. The District Court noted the Amended Complaint also sought payment of interest under several other theories of "equitable relief," such as a declaratory judgment that all payments by ABB for delayed benefits must include interest, an injunction requiring payment of interest on delayed benefits, the imposition of a constructive trust upon all Plan assets equal to interest on delayed benefits, and equitable restitution in the amount of interest on the delayed benefits. The Court questioned whether such payment of interest under such theories comported with the definition of the term "equitable relief" in § 502(a)(3)(B) pursuant to the holdings of *Mertens v. Hewitt Associates*, 508 U.S. 248 (1993) and *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002). In any event, the Court declined to rule on the issue, in light of its ruling that the Amended Complaint failed to allege facts establishing any violation of the terms of the Plan or of ERISA. Pet. App. 26-27.

5. Count II of the Amended Complaint essentially re-pled the allegations of the initial Complaint with respect to the requested relief pursuant to § 502(a)(1)(B), which Flint acknowledged had been already foreclosed by the District Court's prior order and was presented solely for preservation of the issue on appeal. Pet. App. 27.

3. The Eleventh Circuit Court of Appeals Affirmed the District Court's Dismissal.

The Court of Appeals rejected Flint's assertions of error. First, the Court categorically refused to adopt Flint's argument that accrued interest in this situation amounted to an implied term of the Plan and thus qualified as "benefits due . . . under the terms of his plan" within the meaning of § 502(a)(1)(B). The Court of Appeals relied specifically upon the Supreme Court's repeated cautions against the drawing of inferences regarding implied causes of action in the ERISA context not specifically provided by Congress within ERISA's "carefully crafted and detailed enforcement scheme." Furthermore, the Court below noted that none of the Circuit Courts of Appeals have recognized a claim for interest pursuant to § 502(a)(1)(B) of ERISA under circumstances similar to the instant case. Pet. App. 6-7.

Regarding Flint's claim that the interest he sought qualified as "other equitable relief" pursuant to § 502(a)(3), the Court of Appeals declined to determine whether or not such a claim could be maintained as a matter of law. The Court held that, assuming such a claim was viable, the District Court correctly determined that the Amended Complaint failed to establish the necessary predicate of a breach of the Plan, of ERISA or of the Department of Labor's regulations. Pet. App. 10. The Court rejected Flint's theory that ABB breached its fiduciary duty by discontinuing benefits without first providing Flint with an opportunity to prove continued disability, concluding there was no such requirement in the terms of the Plan relied upon by the Amended Complaint. In this respect, the Court noted that "ERISA employers owe a fiduciary duty to all of their covered employees [and that] ABB had a duty to protect and preserve benefit funds

according to the provisions of the Plans and the ERISA statute." *Id.*, 11. Finally, the Court noted that no facts were pled suggesting that ABB unduly delayed the appeals process or wrongfully failed to reinstate Flint's benefits as a result of his appeal. In fact, the Court concluded that "Flint's own allegations make clear that the appeals process functioned according to Plan provisions and ERISA regulations—and that this process led to the retroactive reinstatement of benefits within six months of the initial adverse decision." *Id.*, 11-12. For these reasons, the Court of Appeals concluded Flint had not stated a claim under § 502(a)(3)(B).

REASONS FOR DENYING THE PETITION

1. There is No Conflict Among the Circuit Courts of Appeals Regarding Whether a Refusal to Pay Interest on Benefits Paid After a Successful Appeal Will Support a Claim Under §§ 503(a)(1)(B) or 503(a)(3)(B) Without Any Violation of the Plan, ERISA or Related Regulations.

Flint suggests "the answers are conflicting" among the Circuit Courts of Appeals as to whether interest is an available remedy where "benefits are paid retroactively . . . as a result of a successful administrative appeal." Pet. 13-14. However, the cases Flint string-cites for this assertion (without discussion) do not support his Petition.

First, Flint cites *Fotta v. Trustees of the United Mine Workers of America Health & Retirement Fund of 1974*, 319 F.3d 612 (3d Cir. 2003), *cert. denied*, 124 S. Ct. 468 (2003). *Fotta*, however, did not involve a claim under 502(a)(1)(B) at all. Further, it expressly holds that, in order to prevail on a

claim based upon § 502(a)(3)(B), "an ERISA beneficiary who seeks interest on delayed payments must first prove that those payments were withheld in violation of his ERISA plan or of ERISA itself." *Id.*, 319 F.3d at 616. This case clearly is consistent with the Eleventh Circuit's determination in the instant case. The same is true of *Jackson v. Fortis Benefits Ins. Co.*, 245 F.3d 748 (8th Cir. 2001), which dismissed a complaint seeking interest based on the absence of any factual allegation of a breach of a plan term or ERISA.

Flint also cites *Dunnigan v. Metropolitan Life Ins. Co.*, 277 F.3d 223 (2d Cir. 2002). In *Dunnigan*, however, the complaint expressly alleged that the denial of the participant's benefit application and appeal occurred after the expiration of "the time periods specified by the Secretary of Labor's regulations." *Id.*, at 226. Indeed, the delay in the administrative appeal process in *Dunnigan* exceeded five years. *Id.*, at 230. Therefore, *Dunnigan* provides no conflict with the Court of Appeals' decision below that a claim under § 502(a)(3)(B) must be supported by an alleged violation of the Plan or of the provisions of ERISA or its regulations. Similarly, *Kerr v. Charles F. Vatterott & Co.*, 184 F.3d 938 (8th Cir. 1999) does not support Flint because the Eighth Circuit: (1) expressly rejected the plaintiff's claim for interest pursuant to § 502(a)(1)(B), and 2) held that interest was not recoverable as "appropriate equitable relief" under § 502(a)(3)(B). *Id.*, 184 F.3d at 945.

The final case cited by Flint in support of his contention that there is conflict between or among the circuits, *Clair v. Harris Trust & Sav. Bank*, 190 F.3d 495 (7th Cir. 1999), *cert. denied*, 528 U.S. 1157 (2000), actually carries the day for ABB. *Clair* not only rejected an interest claim under

§ 502(a)(1)(B) on the same grounds upon which the courts below ruled in the instant action, but also held the same claim pursuant to § 502(a)(3)(B) "borders on the frivolous." *Id.*, 190 F.3d at 497, 499.

2. There is no Compelling Reason for Supreme Court Review.

a. Flint's claim for interest on benefits as an "implied term" of the Plan is unsupported by any decision of a Court of Appeals and is in direct conflict with established precedent of the Supreme Court.

Flint identifies no case, whether issued by a District Court or a Court of Appeals, holding that a cause of action exists under any of ERISA's precisely drawn civil remedy provisions to recover interest as an "implied term" of an ERISA plan. Flint attempts to coble together authority for his proposition via a strained extrapolation of non-ERISA decisions regarding the common law of contracts. In so doing, however, Flint finds himself arguing against well-established precedent of this Court.

The High Court has repeatedly and strongly cautioned against the drawing of inferences regarding the existence of remedies in ERISA that were not explicitly provided for by Congress. *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134 (1985); *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41 (1987), *overruled, in part, on other grounds, Kentucky Association of Health Plans, Inc. v. Miller,* 123 S. Ct. 1471 (2003); *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432 (1999); *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002). In *Russell*, the Court "emphasized [its] unwillingness to infer

causes of action in the ERISA context, since that statute's carefully crafted and detailed enforcement scheme provides 'strong evidence that Congress did not intend to authorize other remedies it simply forgot to incorporate expressly.'" *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 254 (1993) (quoting *Russell*, 473 U.S. at 146-7). *Russell* addressed a claim under § 502(a)(1)(B) and held that the statutory sections say "nothing about the possible consequences of delay in the plan administrator's processing of a disputed claim[;] [t]hus, there is really nothing at all in the statutory text to support the conclusion that such a delay gives rise to a private right of action for compensatory or punitive relief." *Russell*, 473 U.S. at 144. Flint's claim for interest on benefits approved on appeal seeks relief based on the "consequences of delay" foreclosed by *Russell*.

Flint argues that "ERISA Plans are contractual" and cites cases allowing interest on contract claims. Flint further contends that Congress did not "intend to overrule, sub silentio, over 150 years of contract law making interest an implied term of all contracts." Pet. 12-13. Flint apparently forgets that ERISA is inherently equitable, not legal in nature. In adopting the discretionary review standard from trust law and courts of equity, this Court noted in *Firestone Tire and Rubber Co. v. Bruch*, 489 U.S. 101, 112 (1989), as follows:

> Actions challenging an employer's denial of benefits before the enactment of ERISA were governed by contract law.

ERISA does not adopt contract law or legal relief flowing from contracts, but instead follows trust law and awards equitable relief as specified in the statues. *Id.*, at 110. *Russell*, 473 U.S. at 146.

Flint suggests that the Court of Appeals' decision on this issue somehow conflicts with the basic purpose of ERISA. Pet. 12-13. As this Court noted in *Mertens*, "[v]ague notions of [ERISA's] basic purpose are nonetheless inadequate to overcome the words of its text regarding the specific issue under consideration." *Mertens*, 508 U.S. at 261.

b. Flint's Claim Under § 502(a)(3) for Interest Following a Successful Administrative Appeal is not Cognizable under ERISA.

As discussed above, Flint lacks authority for recognition of a cause of action under § 502(a)(3) under the facts presented. Indeed, Flint acknowledges the impact of *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002), as "cast[ing] doubt on those cases relying on § 502(a)(3)(B)." Pet. 14. The courts below were correct in holding interest under § 502(a)(3) is not "equitable relief" and that no such claim could exist absent a breach of the Plan or ERISA.

3. The District Court properly exercised its discretion in disregarding documents submitted by Flint which were not attached to or referenced in the Amended Complaint and were not verified.[6]

Upon the dismissal of Flint's initial Complaint, the District Court allowed Flint ample time to file an Amended Complaint, which he did. In his opposition brief to ABB's Motion to Dismiss the Amended Complaint, Flint attached information relating to Flint's disability and pages from

6. The Court of Appeals did not specifically address this issue in the decision on appeal.

benefit plans without any verification or affidavit identifying them. No attempt was made by Flint to amend the complaint to add them or allegations relating to them. Moreover, Flint fails to identify anything in the unverified documents which supports his claim for interest. Instead, they relate to the underlying claim for disability benefits, which was paid by ABB after Flint's successful appeal.

In any event, Flint does not explain to this Court in any way how the proffered documents give rise to a claim for interest under ERISA.

CONCLUSION

For the foregoing reasons, the undersigned submits the Petition for a Writ of Certiorari should be denied.

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